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No. 87-2020

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLARD W. MANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge erred in allowing the prosecution to introduce three sexually oriented magazines into evidence during its case-in-chief in order to prove petitioner's specific intent, an essential element of the charged crimes, without first waiting to see if the defense contested that element of the crime.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-11a) is reported at 26 M.J. 1. The opinion of the Air Force Court of Military Review (Pet. App. 12a-22a) is reported at 21 M.J. 706.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 11, 1988. The petition for a writ of certiorari was filed on June 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Homestead Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted of sodomy and indecent acts upon a child under the age of 16, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. He was sentenced to con-

finement for 25 years, a dishonorable discharge, and ancillary punishments. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 12a-22a). The Court of Military Appeals affirmed (*id.* at 1a-11a).

1. Petitioner was convicted of three specifications of committing indecent acts upon his nine-year-old daughter Amy, with the specific intent to arouse his sexual desires, and one specification of sodomy upon Amy.[1] The crimes occurred in the family home while petitioner was stationed at the Homestead air base.

The primary evidence against petitioner consisted of Amy's testimony. She testified that petitioner had first molested her some years beforehand when the family was living in Alaska (Tr. 75-79), and that he continued to do so after they moved to Florida (Tr. 79-81). She said she did not tell anyone about the incidents because petitioner had threatened to beat her if she did (Tr. 81-82). The molestation consisted of petitioner's touching the area between Amy's legs and inserting his finger into her vagina (Tr. 76, 79-80). She knew his finger was inside because she could feel it move (Tr. 76, 80).

After the family moved into government quarters on the Homestead base in April 1983, petitioner continued to molest Amy and to threaten her with a beating if she told anyone about it the incidents (Tr. 83-84, 89, 95, 96). These episodes usually occurred on Thursday nights, when Amy's mother was attending "Weight Watchers" meetings and the other children were playing elsewhere (Tr. 84). On

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[1] Petitioner was acquitted of a specification alleging indecent acts against his other daughter, Mary, and a specification alleging an assault upon his wife.

one of those occasions, petitioner placed his tongue inside Amy's vagina and moved it around (Tr. 85). On another occasion, petitioner applied vaseline to an oral thermometer and inserted it into her vagina (Tr. 87-88). When Amy told petitioner that it hurt, petitioner told her to be quiet or he would "stick a needle" into her (Tr. 89). Amy further testified that on another occasion, again on a Thursday night when her mother was away, petitioner used his socks to tie Amy to a wooden ladder-back chair, and then tipped it against the bed in his bedroom, so that she was facing the ceiling (Tr. 89-92). He then removed her pants and underwear and attempted to insert a rubber device into her vagina (Tr. 93-94). When Amy made up an excuse about having to use the bathroom, petitioner let her go. She went to the bathroom and locked the door behind her (Tr. 94). Amy later identified a motorized artificial penis that petitioner kept in his toolbox as the rubber device petitioner had used, and she testified that it was moving when he attempted to insert it into her vagina (Tr. 94-95, 155, 179; PX 2). She did not tell anyone about those events until after her parents had separated and she was living with her mother and siblings in California (Tr. 97, 156-157).[2]

2. Before trial began, the prosecution moved to introduce as part of its case-in-chief three magazines (PXs 3-5)[3] that petitioner kept in his toolbox along with the

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[2] A subsequent physical examination revealed scarring in Amy's posterior forchette (the area where tissues meet at the rear of the vaginal opening) that was consistent with the sexual abuse she described (Tr. 170-171; AX 7).

[3] Prosecution Exhibit 3 was entitled *Show Me*, a self-professed sex education manual for children; Prosecution Exhibit 4 was entitled *Young Snatch*; and Prosecution Exhibit 5 was entitled *Tight Twats*.

artificial penis and a jar of vaseline (Tr. 28, 37, 39, 43).[4] The defense objected on three grounds: the magazines were not relevant; they were being offered simply to show that petitioner was a man of bad character; and they were unduly prejudicial (Tr. 28-29; see Tr. 41). The trial judge admitted the magazines, finding them to be relevant on the issue of petitioner's intent to arouse or gratify his sexual desires, which was an essential element of the charged indecent act offenses (Tr. 42-43).

Petitioner pleaded not guilty to all the charges and denied that the offenses occurred (Tr. 9, 174-178). He ad-

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The court of military review described them as follows (Pet. App. 17a):

> The first of the magazines offered by the government in this case was labeled as a sex education manual and, as found by the military judge:
>
> > It depicts people from birth to adulthood, young children nude of opposite sex together not in suggestive poses, a young boy holding an erect penis, a father naked playing with his youngish naked daughter, a young boy with an erection touching the small breasts of a young but older female, and a young girl fondling the penis of a younger male, and et cetera.
>
> As described by the military judge, the manual contains approximately 140 pages of photographs of naked children and adults. In some poses, the adult models are engaging in sexual activities while the children are apparently watching. The other two magazines "depict young ladies having reached puberty in various poses with at times sexual aids, some nonelectric, others apparently of the electric type. Most of these young girls appear developed, with breast development and pubic hair. None appear to be non-teenagers." This Court would further note that in most of the photographs the young ladies are either using a sexual device, or have one or more fingers inserted in their vaginas.

[4] The artificial penis and jar of vaseline were separately admitted into evidence without defense objection (Tr. 27; PX 2).

mitted owning the artificial penis (PX 2), but he claimed that he had purchased it in Alaska as a "gag gift" for a friend and later was too embarrassed to give it to her (Tr. 179). He could not explain why he had kept it, however (Tr. 205-206). He also admitted owning the magazines and keeping them where they were found in his toolbox. According to petitioner, he purchased the magazine *Show Me* (PX 3) in Alaska for the purpose of using it to answer the children's questions about sex, but never used it because it was too "explicit" (Tr. 180).[5] Petitioner testified that he purchased the other two magazines (PXs 4, 5) in California and kept them for his own entertainment (Tr. 181, 210-211). He said that his wife and children were confused or lying (Tr. 192, 204), but he agreed that they had much to lose if he was convicted, and he could not think of a reason why they would lie (Tr. 197, 201).

In his final instructions to the court-martial panel, the trial judge told the panel members that they could consider the magazines only on the issue whether petitioner entertained the specific intent necessary for the indecent act crimes (Tr. 264).

ARGUMENT

Petitioner's claim is quite narrow. He does not challenge the Court of Military Appeals' conclusion that engaging in indecent acts with a child under 16 is a specific intent crime, requiring the prosecution to prove beyond a reasonable doubt that he committed the acts with the intent to arouse, appeal to, or gratify his lust or passions or sexual desires. Pet. App. 5a. Nor does he deny that the

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[5] Petitioner's wife testified that she had never seen the book prior to finding it in the toolbox, nor had she and petitioner ever discussed using *Show Me* to answer the children's questions about sex (Tr. 155).

magazines were probative of that element of the offense. Finally, petitioner does not challenge the unanimous finding of the military courts that the probative value of the magazines outweighed their potential prejudicial effect. *Id.* at 6a-7a, 18a; Tr. 42-43. Instead, petitioner claims that the magazines were not admissible under Mil. R. Evid. 404(b)[6] because his complete denial that he committed the charged indecent acts did not place his intent in issue in this case. The trial judge therefore erred, according to petitioner, by admitting the magazines before the defense had presented its case. Petitioner did not assert that objection at trial, however, and therefore has waived his claim. In addition, unless the trial court's decision to admit the magazines was erroneous on the merits, the timing of its decision is immaterial. Petitioner, however, has not challenged the merits of the trial court's decision. In any event, petitioner's claim is unpersuasive.

1. As a general rule, any element of a crime that the prosecution must prove beyond a reasonable doubt is a material issue in the case unless the defendant pleads guilty or affirmatively removes that element from consideration by the trier of fact—for example, by stipulating that it need not be proved by the prosecution. "A simple plea of not guilty." like the one petitioner entered, "puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States,* No. 86-6109 (Feb. 24, 1988), slip op. 6. Because the indecent act offenses

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[6] Mil. R. Evid. 404(b), which was taken from and is substantially similar to Fed. R. Evid. 404(b), provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

with which petitioner was charged are specific intent crimes, petitioner's not guilty plea put the government to its burden of proof as to his intent, the sole issue to which the magazines related. The trial judge therefore acted within his broad discretion in admitting the magazines, because they were relevant to an issue in the case.

Petitioner contends (Pet. 6) that his not guilty plea did not truly put his intent in issue, because the charged indecent acts "speak for themselves," *i.e.*, the finding that he committed the charged acts would inevitably lead to the conclusion that he did so with the requisite intent. Petitioner maintains that the prosecution should be forbidden in any such case from introducing other acts evidence before the accused has presented his defense.

There is no good reason to adopt the broad per se rule that petitioner urges. First, petitioner's submission finds no support in the text of Mil. R. Evid. 404(b). Rule 404(b) lists the situations in which other acts evidence may be admitted. It does not require that a trial judge wait until the defense has completed its case before ruling on the admissibility of evidence offered by the prosecution. The timing of such decisions has historically been left to the broad discretion of trial courts. As this Court recently observed in connection with Fed. R. Evid. 404(b), "[t]he trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice." *Huddleston* v. *United States*, No. 87-6 (May 2, 1988), slip op. 9.

Petitioner's suggestion is also unsound as a policy matter. The probability (or even the likelihood) that the trier of fact will infer intent simply from the government's evidence that the defendant committed the charged acts does not mean that the trier of fact will necessarily draw that inference, or that the prosecution should be limited to

relying on such an inference to meet its burden of proof. Although an inference of intent would satisfy the prosecution's burden as a matter of due process (*Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 10), the constitutional standard for sufficiency of the evidence should not be used to define the limits of the government's ability to prove its case. The defendant is adequately protected from undue prejudice by the four safeguards identified in *Huddleston*: the Rule 402 requirement that the evidence be relevant; the Rule 404(b) requirement that the evidence be admitted for a proper purpose; the balancing of the probative value of the evidence against its potential for undue prejudice required by Rule 403; and the requirement in Rule 105 that upon request the trial judge must instruct the trier of fact about the limited purposes for which the evidence may be considered. *Huddleston* v. *United States*, slip op. 10-11.[7] The defendant therefore should not be entitled unilaterally to force the prosecution to forgo the use of otherwise probative evidence and to rely instead on an inference that may or may not be drawn by the trier of fact.

For these reasons, several courts of appeals have ruled that when the defendant pleads not guilty to a crime with a specific intent element, the prosecution may introduce other acts evidence during its case-in-chief to prove his intent, even if the defendant does not contest the intent element of the charged crime. *United States* v. *Burkett*, 821 F.2d 1306, 1309 (8th Cir. 1987); *United States* v. *Henthorn*, 815 F.2d 304, 308 (5th Cir. 1987); *United States* v. *Townsend*, 796 F.2d 158, 161-162 (6th Cir. 1986); *United States* v. *Nahoom*, 791 F.2d 841, 845 (11th Cir. 1986); *United States* v. *Liefer*, 778 F.2d 1236, 1242-1243 (7th Cir.

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[7] The provisions of Mil. R. Evid. 105, 402, and 403 are not materially different from their counterparts in the Federal Rules of Evidence.

1985); *United States* v. *Franklin,* 704 F.2d 1183, 1188 (10th Cir.), cert. denied, 464 U.S. 845 (1983); *United States* v. *Buchanan,* 633 F.2d 423, 426 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981); cf. *United States* v. *Feldman,* 788 F.2d 544, 557 (9th Cir. 1986) (evidence used to prove the defendant's motive).

Petitioner claims that the decision below conflicts with dictum in *United States* v. *Fearns,* 501 F.2d 486 (7th Cir. 1974), to the effect that the trial judge should wait until the defense has presented its case in order to see whether it contests intent before allowing the prosecution to introduce other acts evidence. That claim lacks merit. Subsequent Seventh Circuit decisions have limited the dictum in *Fearns* (which in any event was merely a suggestion, not a directive) to general intent crimes. Where the crime has specific intent as a separate element, the rule in the Seventh Circuit is that the defendant's not guilty plea places his intent in issue for purposes of Rule 404(b).[8] The Second Circuit decision on which petitioner relies, *United States* v. *Leonard,* 524 F.2d 1076 (1975), cert. denied, 425 U.S. 958 (1976), upheld the admission of other acts evidence during the prosecution's case-in-chief, and did not adopt the rule that petitioner urges. 524 F.2d at 1091-1092.[9] Accordingly, there is no conflict warranting

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[8] *United States* v. *Brantley,* 786 F.2d 1322, 1329 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Liefer,* 778 F.2d at 1242-1243; *United States* v. *Chaimson,* 760 F.2d 798, 804-806 (7th Cir. 1985); *United States* v. *Shackleford,* 738 F.2d 776, 781-782 (7th Cir. 1984); *United States* v. *Weidman,* 572 F.2d 1199, 1202 (7th Cir.), cert. denied, 439 U.S. 821 (1978); *United States* v. *Juarez,* 561 F.2d 65, 73 (7th Cir. 1977).

[9] Other Second Circuit decisions have indicated that the admission of other act evidence to prove intent may be erroneous when there is an " 'unequivocal concesssion of the element by the defendant' " (*United States* v. *Peterson,* 808 F.2d 969, 974 (1987) (citation

this Court's review.[10]

2. Finally, the admission of the magazines did not prejudice petitioner's substantial rights. Art. 59(a), UCMJ, 10 U.S.C. 859(a); Mil. R. Evid. 103(a).[11] The evidence against petitioner apart from the magazines amply proved that he committed the indecent acts, as the Court of Military Appeals noted (Pet. App. 9a), and the inference that he did so with the requisite intent was "overpowering." *Rose* v. *Clark*, slip op. 10. Even petitioner candidly admits (Pet. 6) that, if the panel members found that he committed those acts, they would also

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omitted)), or when the defense "express[es] a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed." *United States* v. *Figueroa*, 618 F.2d 934, 942 (1980). Petitioner has not satisfied that standard, however. See Tr. 259, 261, 264, 265 (panel instructed, without defense objection, on the need to find petitioner's intent).

[10] *People* v. *Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967), cited by petitioner (Pet. 6), is inapposite, since it involved a matter of state, not federal, evidence law. Moreover, the evidence was ordered excluded in that case in part because it involved acts that were too dissimilar to and remote from the ones charged against the defendant. 66 Cal. 2d at 246-247, 424 P.2d at 957, 57 Cal. Rptr. at 373.

[11] Article 59(a) and Rule 103(a) preclude reversal of a conviction based on errors that did not materially prejudice the defendant's substantial rights. A similar standard is applied in the federal courts. Fed. R. Crim. P. 52(a). Absent an error of constitutional dimension, the harmless error determination in a case like this one should be governed by military law. Cf. *Chapman* v. *California*, 386 U.S. 18, 21 (1967) ("The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law.").

necessarily have found that he did so intentionally. Under these circumstances, any error in admitting the three magazines could not have contributed significantly to the verdict. See *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

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[12] The fact that petitioner was convicted of the crimes against his daughter Amy, but was acquitted of the alleged indecent act against his other daughter, demonstrates that the members based their findings on Amy's testimony, and not on any belief that petitioner was simply a man of bad character because he owned the magazines. Moreover, Amy's testimony was clear, consistent, and unwavering. She described the alleged incidents in great detail, and her testimony was corroborated by the medical evidence and by petitioner's admitted possession of the artificial penis identified by Amy as the one that he had used on her.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60543